No. 84-1717

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL ROBERT QUINN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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In this case the only question preserved below, decided by the court of appeals, and presented in our petition for certiorari is whether respondent had a reasonable and legitimate expectation of privacy in the *Sea Otter* that gave him "standing" under the Fourth Amendment to challenge the *search* of the vessel. In his brief in this Court, however, respondent subordinates that question to the issue he now seeks to assert of whether he had "standing" based on his ownership of the *Sea Otter* to challenge the *seizure* of the boat. Respondent's new-found litigating position is not properly before the Court and in any event is without merit. With regard to the question that is presented here, the Ninth Circuit plainly erred in reversing the district court's ruling that respondent lacked "standing" to contest the search of the *Sea Otter*.

1. The evidence at issue in this case is marijuana debris that was found when the hold of the *Sea Otter* was pumped out. In arguing that he had an expectation of privacy in the *Sea Otter*, and therefore was entitled to challenge that search as the basis for seeking suppression

of the evidence, respondent essentially tracks the opinion of the court of appeals. In so doing, respondent fails to come to grips with the analysis presented in our opening brief, which demonstrated that an expectation of privacy was not established by respondent's ownership of the *Sea Otter* (see U.S. Br. 13-16),[1] his role as a co-venturer in the drug smuggling operation (see U.S. Br. 17-19), his possessory interest in the marijuana that had been transported in the *Sea Otter* (see U.S. Br. 19-24), and the existence of water in the ship's hold that had to be removed in order to recover the marijuana debris (see U.S. Br. 24 n.16). We add the following brief comments in reply to respondent's specific contentions.[2]

In seeking to support his expectation of privacy, respondent argues (Br. 21, 27 n.29) that he was in constructive possession of the *Sea Otter* and its cargo of marijuana by virtue of his title to the boat, his ownership of the drugs, and his involvement as a co-venturer in the enterprise. We agree that these facts would render respondent criminally liable for constructively possessing and importing marijuana. But that does not establish the requisite privacy

[1] See also *United States* v. *Metzger*, 778 F.2d 1195, 1200 (6th Cir. 1985) ("[i]t is well-settled * * * that ownership interest is only one fact to be considered and standing alone will not give defendant a reasonable expectation of privacy").

[2] We also note that in several instances (see Resp. Br. 5 n.5, 6 nn.6, 7, 25 n.28) respondent now either disputes the government's factual submission in the district court or relies on assertions that are outside the record. (In his brief in the court of appeals (at 6, 7), on the other hand, respondent acknowledged that the relevant facts "are largely uncontested" and "essentially undisputed"; at no point in the district court or the court of appeals did respondent take issue with the government's statement of facts.) While these differences are not material to the legal issue presented in this Court, they do illustrate the problems that can arise when a defendant does not satisfy the burden placed on him of alleging and (if necessary) proving the facts required to establish his "standing." See U.S. Br. 12.

interest under the Fourth Amendment. In *United States* v. *Salvucci*, 448 U.S. 83 (1980), this Court rejected the proposition, which had underlain the "automatic standing" rule of *Jones* v. *United States*, 362 U.S. 257 (1960), that the government could not "assert that the defendant possessed the goods for purposes of criminal liability, while simultaneously asserting that he did not possess them for the purposes of claiming the protections of the Fourth Amendment" (448 U.S. at 88). As the Court explained, "a prosecutor may, with legal consistency and legitimacy, assert that a defendant charged with possession of a seized item did not have a privacy interest violated in the course of the search and seizure" (448 U.S. at 88-89). The doctrine of constructive possession well illustrates the Court's conclusion in *Salvucci* that a defendant's possessory interest is not equivalent to an expectation of privacy protected by the Fourth Amendment.[3] See also *Rawlings* v. *Kentucky*, 448 U.S. 98, 105-106 (1980).

Respondent also misconstrues our argument in several respects. First, our position is not, as respondent characterizes it (Br. 22-23), that a defendant cannot have an expectation of privacy in an area in which contraband is hidden or that his interest in the concealed contraband is irrelevant in analyzing the issue of privacy. On the contrary, our opening brief (at 22-23 & n.15, 25-26) explicitly recognized that the use a person makes of an area to keep his property, including contraband, may bear on his expectation of privacy and that a privacy interest in a place is not lost simply because contraband is stored there. See *Rawlings*, 448 U.S. at 105; *Salvucci*, 448 U.S. at 91; *Rakas* v. *Illinois*, 439 U.S. 128, 142 n.11, 144 n.12 (1978).

[3] The government's briefs in *Salvucci* (see U.S. Br. at 23-28; U.S. Reply Br. at 21-25) relied on the doctrine of constructive possession as the primary example of the difference between a possessory interest proscribed under substantive criminal law principles and a privacy interest protected under the Fourth Amendment.

Rather, our point is that under *Rawlings, Salvucci*, and *Rakas* a possessory interest in the items seized, while relevant in indicating the use to which the searched area was put, does not itself establish a privacy interest in the area. Our further point is that, even if a possessory interest in the item seized were sufficient in and of itself to entitle a defendant to contest the search of the place where the item is located, an interest in contraband is wholly illegitimate and therefore would not support a Fourth Amendment claim premised on the government's interference with the defendant's right of possession. Contrary to respondent's understanding, our argument does not deny that a reasonable expectation of privacy can exist in an area that a person uses for an illicit purpose.[4]

In addition, respondent characterizes (Br. 26-28) our argument to be that a defendant automatically abandons his privacy interest if he turns over his property to another and is not present at the time of the search. However, our opening brief specifically stated that abandonment would *not* necessarily occur in those circumstances. See U.S. Br. 17 n.7.[5] But more importantly, we also explained that the

[4] For this reason, respondent's reliance (Br. 23-25, 28) on *United States* v. *Jeffers*, 342 U.S. 48 (1951), does not support his contention. As discussed in our opening brief (at 23 n.15, 25-26), this Court has explained that "standing" in *Jeffers* rested on the defendant's expectation of privacy in light of his access to and use of the hotel room that was searched. *Jeffers* holds that a privacy interest can exist even though the defendant has no common-law property right in the searched premises and uses it, among other purposes, to store drugs; it does not suggest that bare ownership of the searched area and its use by *others* to secrete contraband would create an expectation of privacy.

[5] In this case, though, we do believe that respondent, by giving up custody and control of the *Sea Otter* to Hunt for such an extended period, would have lost any reasonable expectation of privacy he might previously have had. See U.S. Br. 16 n.6, 17 n.7.

question in this case is not whether respondent abandoned a privacy interest that he had; rather, it is whether he had an expectation of privacy in the first place. For the reasons stated in our opening brief, we submit that respondent never had an expectation of privacy in the *Sea Otter*. To reformulate this issue in terms of abandonment, as respondent seeks to do, can serve only to invite confusion and obscure sound analysis.

Respondent further complains (Br. 21-22) that we erred in relying on the fact that he relinquished custody and control over the *Sea Otter* to Hunt for the two-year period following the search in addition to the two-month period preceding it. Citing *Walter* v. *United States*, 447 U.S. 649, 658 n.11 (1980) (opinion of Stevens, J., announcing the judgment of the Court), respondent contends that events subsequent to the search are irrelevant to the issue of his expectation of privacy at the time of the search. In the abstract, however, we do not see why later events cannot illuminate a defendant's prior expectations. And in any event the result in this case would not be any different if the *Sea Otter* had been returned to respondent immediately after the search. But most significantly, our argument here, in contrast to *Walter*, is not that a defendant waives a privacy interest if he does not promptly assert his claim by seeking to retrieve property that might incriminate him. Instead, respondent contemplated from the beginning that Hunt would retain the *Sea Otter* even after the smuggled marijuana had been delivered to respondent's ranch. See U.S. Br. 2-3. Respondent's contemporaneous understanding that the boat would be out of his custody and control not only for the extended period of Hunt's South American voyage, but for an indefinite period thereafter as well, plainly indicates that respondent had no reasonable expectation of privacy.[6]

[6] By contrast, the fact that respondent was living on the *Sea Otter* in August 1983 (Resp. Br. 3, 6, 22)—more than four years after the

Respondent also objects (Br. 21) that our argument does not address the "conjunction" (Pet. App. 2a) of the considerations invoked to support his "standing." We acknowledged in our opening brief (at 25-26) that in some circumstances a combination of factors could give rise to an expectation of privacy even though each of them individually might not be sufficient. But in this case, *none* of the factors asserted by respondent contributes to his claim of privacy; whether taken singly or cumulatively, those factors – his title to the *Sea Otter*, his role as a co-venturer, his interest in the smuggled marijuana, and the presence of water in the hold – do not create the requisite privacy interest to entitle respondent to challenge the search of the vessel.

In the end, the decision of the Ninth Circuit cannot be reconciled with fundamental Fourth Amendment principles established by this Court. In effect, the court of appeals has established a new rule of "automatic standing" that would allow a defendant who is the absentee owner of a conveyance – and who, as in this case, will often be the organizer or leader of the illegal enterprise – to challenge any search of the conveyance that occurs during a joint criminal venture. In this way, as Judge Sneed noted in his dissent below (see Pet. App. 4a), the court has invested criminal defendants with a privacy interest that would not exist for "innocent and law abiding" people in similar but lawful circumstances. There is no warrant in the Constitution for recognizing greater expectations of privacy for criminal defendants than for the general public.

2. Relegating the foregoing issue to a secondary position, respondent now principally defends the judgment below on the ground that he was entitled as the owner of the *Sea Otter* to challenge the *seizure* of the vessel and consequently could move to suppress the evidence obtained during the ensuing *search* as the fruit of that seizure. Although respondent does not seek to contest the stop and boarding of the *Sea Otter* (see Resp. Br. 10; see also U.S. Br. 9-10), he contends that federal officials acted improperly in seizing the boat and transporting it to the Coast Guard station where the hold was pumped out. However, respondent's claim of "standing" to challenge the seizure is neither appropriately raised here nor analytically correct.

search in question and almost two years after the boat was turned over to him by Hunt – is clearly irrelevant to the issue of his privacy interest at the time of the search.

a. Respondent chides us for "confus[ing] the concept of 'seizure' with that of 'search' " (Resp. Br. 10; but see U.S. Br. 20), for "seek[ing] to recharacterize the legal issue in this case * * * [and] completely ignor[ing] the primacy of the seizure" (Resp. Br. 10 n.9), and for "blithely ignor[ing] the seizure to focus exclusively on the ultimate search and [respondent's] privacy interests" (*id.* at 12). In actuality, however, it is respondent who offers a revisionist history of this litigation and attempts to recast the controversy in order to raise a new legal issue for the first time in this Court.

In the district court, respondent moved for the "suppression of evidence seized as a result of the search of the [*Sea Otter*]" (J.A. 25) "because there was not probable cause to justify this warrantless search of the vessel" (J.A. 26).[7] The government's memorandum in opposition argued that respondent had "no standing to contest the search of the SEA OTTER" (J.A. 31) because "the search of the SEA OTTER and the seizure of the marijuana * * * [did not invade his] legitimate expectation of privacy" (J.A. 32); in particular, the government noted that respondent could "assert only ownership as a basis for a legitimate expectation of privacy in the SEA OTTER"

[7] Respondent's motion also referred to the initial stop of the *Sea Otter*, an issue that, as noted above, he no longer asserts.

(*ibid.*) and that ownership was not sufficient to establish a privacy interest in the circumstances of this case (J.A. 32-33). The district court ruled that respondent "has no standing to present the motion to suppress and that motion will be denied" (Pet. App. 9a).

Following the district court's denial of the suppression motion, respondent entered a conditional plea of guilty, pursuant to an agreement with the government, "in order to preserve his right to appeal the District Court's decision that he had no standing to contest the search of the 'SEA OTTER' " (J.A. 21). The agreement expressly stated that respondent's "appeal will be limited to that one issue" (*ibid.*).

The caption in his opening brief in the court of appeals (at 6) describes respondent's argument to be that he "had standing to contest the legality of the search of the Sea Otter because he was the owner of the Sea Otter, and the owner of the items seized"; respondent asserted that these ownership interests sufficed to confer "standing" and that the search of the boat "infringed upon an area in which [respondent] had an expectation of privacy" (*id.* at 9).[8] In turn, the government's brief (at 8) argued that "an ownership interest does not create an expectation of privacy where the defendant relinquished possession of the item searched" and that respondent did not have "a legitimate expectation of privacy in the invaded place" (*id.* at 9); accordingly, it concluded that because respondent had "relinquished any expectation of privacy, he should not be allowed to contest the search" (*id.* at 12). In his reply brief (at 2), respondent, seeking to answer the government's

[8] In several places in his brief, respondent referred without differentiation to the "seizure and search" of the *Sea Otter*. At no point, however, did respondent focus on the seizure separately from the search or discuss the seizure in terms of the detention of the vessel to transport it to the Coast Guard station.

argument that he "lacks standing to contest the legality of the search," contended that he "has a Fourth Amendment right to a reasonable expectation of privacy in the contents of the boat"; based on that contention, respondent asked the court of appeals to "remand the case to the district court for resolution [on the merits] of the issue of the legality of the search of the Sea Otter" (*ibid.*).[9]

After submission of the briefs, the court of appeals entered an order directing counsel to respond to the following questions at oral argument:

> 1. Does [respondent] have standing to contest the search of the Sea Otter based upon an arrangement between [respondent] and Hunt that indicates joint control and supervision of the Sea Otter? • • •
>
> 2. Does [respondent] have standing to contest the search of the Sea Otter based upon a formalized agreement with Hunt for the transportation of marijuana? • • •

Order of July 20, 1984. Following oral argument, the court of appeals rendered its decision reversing the district court's ruling that respondent "lacks standing to contest the search of his fishing vessel" and holding that respondent "had a legitimate expectation of privacy in the place

[9] In his reply brief, respondent again referred without distinction to the "seizure and search" of the *Sea Otter*. In addition, and for the first time in this proceeding, respondent adverted (at 3) to the question "whether the observations of the Customs Patrol officers amounted to probable cause for the forcible seizure and pumping of the holds of the vessel." This passing reference in the reply brief to the "forcible seizure" as well as the search of the *Sea Otter* is simply too little and too late to preserve the issue petitioner now seeks to advance. Indeed, respondent himself expressly acknowledged (*ibid.*) that in the plea agreement it had been "specifically agreed that the appeal in this case would be solely on the issue of whether [respondent] had standing to contest the search of the Sea Otter."

searched (his boat), giving him a basis to charge that the search invaded his Fourth Amendment rights" (Pet. App. 2a).

Finally, in seeking review in this Court of the court of appeals' decision, the single question presented in our petition for certiorari was whether respondent "has a Fourth Amendment expectation of privacy that entitles him to challenge the search of" the *Sea Otter* in the circumstances of this case.

Against this background, it is clear that the sole issue presented throughout this litigation has been whether respondent had an expectation of privacy in the *Sea Otter* that would give him "standing" to challenge the *search* of the boat. That was the only question raised in the district court (see Fed. R. Crim. P. 12(b)(3) and (f)), preserved in the conditional plea agreement (see Fed. R. Crim. P. 11(a)(2)), submitted to and decided by the court of appeals, and encompassed in the petition for certiorari in this Court. Having failed to raise and preserve the point below, respondent cannot now interject the issue of his "standing" to challenge the seizure of the *Sea Otter* as a purported alternative ground for affirming the court of appeals' judgment that he had "standing" to challenge the search.

b. At all events, in the circumstances of this case, respondent's ownership of the *Sea Otter* did not give him "standing" to contest the validity of transporting the vessel to a Coast Guard station in order to pump out its hold. As discussed in our opening brief (at 20), a seizure entails a governmental interference with a person's possessory interest in the object that was seized; in contrast, a search involves an intrusion upon a person's reasonable and legitimate expectation of privacy in the area or item that was searched. See also *United States* v. *Chadwick*, 433 U.S. 1, 33 n.8 (1977) (seizure of a footlocker was "a substantial infringement of [defendants'] use and possession" but "did not diminish [their] legitimate expectation that the footlocker's contents would remain private"); *Texas* v. *Brown*, 460 U.S. 730, 747-748 (1983) (Stevens, J., concurring in the judgment) (a seizure implicates "the interest in retaining possession of property" while a search involves "the interest in maintaining personal privacy"); *United States* v. *Place*, 462 U.S. 696, 716 (1983) (Brennan, J., concurring in the result).

We assume here that property unlawfully seized, as well as the fruits of the unlawful seizure, would be subject to suppression under the exclusionary rule. See *Place*, 462 U.S. at 700-701, 707-710; *Coolidge* v. *New Hampshire*, 403 U.S. 443, 473, 478 (1971); *Davis* v. *Mississippi*, 394 U.S. 721, 724 (1969); but cf. *Salvucci*, 448 U.S. at 91 n.6; *United States* v. *Lisk*, 522 F.2d 228, 230 & n.4 (7th Cir. 1975) (Stevens, J.), cert. denied, 423 U.S. 1078 (1976), subsequent opinion, 559 F.2d 1108 (7th Cir. 1977). It may also be assumed that a person whose property is temporarily ou of his possession can retain a sufficient interest in that item to contest its seizure. See U.S. Br. 20 n.11; see also *United States* v. *Jacobsen*, 466 U.S. 109, 120-121 & n.18 (1984); *Place*, 462 U.S. at 705-706 & n.6; *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970).[10]

However, "[t]he intrusion on possessory interests occasioned by a seizure of one's personal effects can vary both in its nature and extent." *Place*, 462 U.S. at 705. In this case, no interest of respondent's was infringed by the government's brief detention of the *Sea Otter* to take it to port.

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[10] Accordingly, while not endorsing each of the historical authorities or decisions cited by respondent (see Resp. Br. 12-20), we do not disagree with the principle that one has "standing" to challenge a seizure if it actually infringed his possessory interest. For example, as respondent is at pains to demonstrate, the owner of a ship that has been wrongfully seized and forfeited can bring a civil action for compensation.

As previously discussed, at the time the *Sea Otter* was apprehended respondent had relinquished custody and control of the boat to Hunt both for the preceding two-month period and for what promised to be and in fact was an extended duration thereafter. During that time, respondent's ownership of the *Sea Otter* gave him no cognizable interest in the freedom of movement of the vessel; the brief period of its detention did not interfere with respondent's residual right to the return of the *Sea Otter* at some indefinite point in the future or even with his commitment of the boat to be used in the joint criminal venture. If the *Sea Otter* had been delayed by bad weather (as in fact occurred), by mechanical problems, or by a frolic and detour on Hunt's part, respondent's interests would not have been harmed in any way. Cf. *Van Leeuwen*, 397 U.S. at 253. The same conclusion is equally applicable to the brief delay occasioned by taking the *Sea Otter* to the Coast Guard station, and therefore respondent had no interest that was implicated by that seizure.

Significantly, respondent appears to concede (Br. 10) that he does not have "standing" to challenge the seizures of the *Sea Otter* involved in the stop and boarding of the boat by California Fish and Game officials or by federal Coast Guard and Customs authorities. That concession is plainly correct, since the brief, temporary interference with the movement of the ship and its crew, had it not led to discovery of criminal activity, could not have affected respondent. See U.S. Br. 9-10. Precisely the same analysis applies to the subsequent detention of the boat when it was taken to port; that detention, while presumably lasting for a somewhat longer period, no more interfered with any interest of respondent's than did the initial stop and boarding.

Notwithstanding respondent's contention (Br. 17-20), our argument does not rest on the notion that he had abandoned his interest in the *Sea Otter*. On the contrary,

we do not dispute that respondent remained the owner of the vessel and retained all incidents of legal title. But his rights as the owner were simply not infringed by the government's brief detention of the *Sea Otter*. That seizure constituted a restraint on the immediate use of the boat; because respondent had turned over the *Sea Otter* to Hunt, he had "[n]o interest protected by the Fourth Amendment [that] was invaded by [the seizure]." *Van Leeuwen*, 397 U.S. at 253. As in *Van Leeuwen*, respondent is " 'unable to show that the [seizure] intruded upon * * * a possessory interest in the [seized object itself].' " *Place*, 462 U.S. at 705-706 n.6, quoting 3 W. LaFave, *Search and Seizure* § 9.6, at 71 (Supp. 1982). See also *Place*, 462 U.S. at 717 n.5 (Brennan, J., concurring in the result).[11]

For the foregoing reasons and those stated in our opening brief, it is therefore respectfully submitted that the judgment of the court of appeals should be reversed.

CHARLES FRIED
Solicitor General

FEBRUARY 1986

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[11] We also note that the facts recited in the government's submission in the district court (see J.A. 29-31, 39-43), including the observation of marijuana debris in plain view by the California Fish and Game officials, clearly established probable cause to seize the *Sea Otter* and transport it to the Coast Guard station (assuming arguendo that probable cause is the standard for such a seizure).